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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------|-------------|----------------------|---------------------|------------------|
| 09/938,884 | 08/24/2001 | Arthur Dale Ericsson | IBRPAT007US | 2533 |

7590 05/21/2003
John R. Casperson
PO Box 2174
Friendswood, TX 77549

EXAMINER

JONES, DAMERON

| ART UNIT | PAPER NUMBER |
|----------|--------------|
|----------|--------------|

1616

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DATE MAILED: 05/21/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application N

09/938,884

Applicant(s)

ERICSSON, ARTHUR DALE

Examiner

D. L. Jones

Art Unit

1616

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 28 February 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-18 is/are pending in the application.
- 4a) Of the above claim(s) 1-9 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 14-18 is/are allowed.
- 6) ☒ Claim(s) 10 is/are rejected.
- 7) ☒ Claim(s) 11-13 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 2.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

APPLICANT'S INVENTION

1. Applicant's invention is directed to a composition comprising a living pathogen targeting organic moiety coupled to a radioisotope. In addition, Applicant has claims directed to a method of treating an infectious disease caused by living pathogens as set forth in independent claims 10 and 14.

Note: Claims 1-18 are pending.

ACKNOWLEDGMENT OF APPLICANT'S ELECTION

2. Applicant's election with traverse of Group II (claims 10-18) in Paper No. 4, filed 2/28/03, is acknowledged. In addition, the Examiner acknowledges receipt of the species wherein the blood borne pathogen is HIV virus, the radioisotope is iodine-131, and the support is particles bearing gp120 antibody. The traversal is on the ground(s) that while the Examiner has stated that Applicant's process may involve an antibody, virus, or other living blood borne pathogen, the claims are directed toward a process, not a composition that is immaterial to the process. This is found non-persuasive because the process for using the product as claimed (e.g., the composition of claims 1-9) may be used with another materially different product. In other words, the process (e.g., the methods of claims 10-18) may be performed using a product comprising a conjugate of a living pathogen-targeting organic moiety wherein the moiety may be selected from an antiviral, antifungal, or an antibacterial antibody, or the moiety may comprise viruses, fungi, bacteria, or prions (see specification page 4, lines 50-57). Hence, the products are separate and distinct. In regards to Applicant's traversal of the

election of species requirement, it should be noted that the Examiner respectfully requested Applicant to elect a species for search purposes only in the office action mailed 2/4/03, Paper No. 3. Hence, the restriction requirement is still deemed proper and is therefore made FINAL.

Note: The full scope of Group II has been searched.

WITHDRAWN CLAIMS

3. Claims 1-9 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

DOUBLE PATENTING REJECTION

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double

patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claim 10 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 40 and 42 of copending Application No. 09/183,454. Although the conflicting claims are not identical, they are not patentably distinct from each other because both sets of claims are directed to a method of treating an infectious disease caused by living pathogens wherein antibodies are replicated. The claims differ in that those of the instant invention have specifically state that the blood to passes through the supported conjugated while the claims of 09/183,454 broadly state that the therapeutic composition comes in contact with the pathogens.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

CLAIM OBJECTIONS

6. Claims 11-13 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Note: Claims 11-13 are distinguished over the prior art of record because the prior art neither anticipates nor renders obvious the additional limitations in the dependent claims in combination with those of the preceding claims. Specifically, the prior art neither anticipates or renders obvious a method of treating an infectious disease caused by a living blood borne pathogen wherein a bed of particles is generated such that the blood from the subject flows through the bed resulting in treated blood that is later returned to the subject.

ALLOWABLE CLAIMS

7. Claims 14-18 are allowable over the prior art of record. In particular, the claims are distinguished over the prior art of record because the prior art neither anticipates nor renders obvious a method of treating an infectious disease that is caused by living blood-borne pathogens having the limitations of independent claim 14.

The closest prior art is that of Dropulic et al (US Patent No. 6,168,953) which is directed to antiviral agents and uses thereof. The instant invention is distinguished over Dropulic et al because it requires the presence of a radioisotope complex and the blood of the subject is passed through a bed formed from particles so that the blood borne pathogens become associated with the radioisotope to result in treated blood that is later returned to the subject.

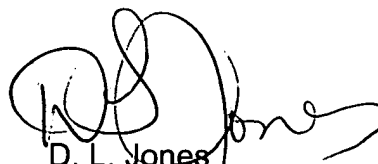
8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to D. L. Jones whose telephone number is (703) 308-4640.

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The examiner can normally be reached on Mon.-Fri. (alternate Mon.), 6:45 a.m. - 4:15 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jose' Dees can be reached on (703) 308- 4628. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 308-4556 for regular communications and (703) 308-4556 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.



D. L. Jones
Primary Examiner
Art Unit 1616

May 14, 2003